United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

w/affidavit of mailing

75-6081

To be argued by
RICHARD J. WEISBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6081

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,

—against—

LEWIS E. ENGMAN, Chairman, Federal Trade Commission, *et al.*,
Defendants-Appellees.

75-6081

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BRIEF FOR DEFENDANT-APPELLEE

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B
P/S

PHILIP MORRIS INCORPORATED,

Plaintiff-Appellant,

—against—

LEWIS E. ENGMAN, Chairman, Federal Trade Commission, *et al.*,

Defendants-Appellees.

75-6085

R. J. REYNOLDS TOBACCO COMPANY,

Plaintiff-Appellant,

—against—

LEWIS E. ENGMAN, Chairman, Federal Trade Commission, *et al.*,

Defendants-Appellees.

75-6088

LOEW'S THEATRES, INC.,

Plaintiff-Appellant,

—against—

LEWIS E. ENGMAN, Chairman, Federal Trade Commission, *et al.*,

Defendants-Appellees.

75-6087

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

—against—

FEDERAL TRADE COMMISSION, *et al.*,

Defendants-Appellees.

75-6090

LIGGETT & MYERS INCORPORATED,

Plaintiff-Appellant,

—against—

LEWIS E. ENGMAN, Chairman, Federal Trade Commission, *et al.*,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Defendants-Appellees.
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BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

(a) The Proceedings Below

The six appellants, who collectively produce approximately 99% of the cigarettes manufactured in the United States, commenced these declaratory judgment actions to obtain pre-enforcement review of the Federal Trade Commission's (the "FTC") interpretation of six cease and desist Consent Orders (A. 24, A. 50, A. 72, A. 94, A. 144, A. 178) to which they are parties. Concomitantly, the appellants moved by Order to Show Cause, returnable on August 25, 1975, for a stay of the operation of statutory penalties under Section 5(l) of the Federal Trade Commission Act (the "Act"), 15 U.S.C.A. § 45(l) (1975 Supp.). On the return date the cases were consolidated for hearing before Judge Tenney. At that time the Gov-

ernment opposed plaintiffs' request for a stay and cross-moved for dismissal on jurisdictional grounds.* On August 28, Judge Tenney denied appellants' motion for a stay, holding that they had failed to meet their burden of demonstrating either irreparable injury, or that the balance of the equities tipped decidedly in their favor.

(b) Statement of Facts

A schema of the underlying facts was presented below by the Government in the affidavit of Eric M. Rubin, an FTC staff attorney. These facts and some of the relevant legislative events may be summarized as follows.

In June, 1964, after the Surgeon General had released the Report of his Advisory Committee on Smoking and Health, the FTC issued a proposed rule requiring the inclusion of a health warning in all cigarette labeling and advertising (A. 218-19). Congress however, upon determining that litigation over this proposed rule might suspend the effectiveness of the FTC's initiative for four years or more, intervened and enacted the Cigarette Labeling and Advertising Act of 1965,** in order to

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* The Government's motion for dismissal on jurisdictional grounds is still pending before the District Court. The Government submits that there is no jurisdiction to consider appellants' actions because the legislative history of the Act evinces a clear Congressional intent to preclude pre-enforcement review of the Commission's cease and desist orders and because the Government's enforcement action provides an adequate forum for the presentation of appellants' claims. *Floersheim* v. *Engman*, 494 F.2d 949 (D.C. Cir. 1973). *See, General Motors Corporation* v. *Volpe*, 457 F.2d 922 (3d Cir. 1972); *Ford Motor Co.* v. *Coleman, et al.*, 75 Civ. 1340 (D. D. C., September 22, 1975, Leventhal, Circuit J.), slip op., notes 29-30 and accompanying text.

** 15 U.S.C. §§ 1331 *et seq.* [Supp. I 1965 (1966)].

"avoid unnecessary delay in protecting the public's health in this area". 2 Code Cong. Adm. News 2350, 2351 (1965). This Act required a health warning on all cigarette packages, but barred until July 1, 1969 the requiring of such a warning in cigarette advertising.

In or about July, 1969, the FTC again announced its intention to promulgate a trade regulation rule requiring a health warning in all cigarette advertising (A. 219). Congress, however, again intervened and enacted the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331, *et seq.*, which is still in force. This Act, in addition to requiring a stronger warning statement, banned all cigarette advertising on broadcast media, effective January 1, 1971. With reference to print advertising, however, the 1969 Cigarette Act contained provisions which required the FTC to hold in abeyance any action on its proposed trade regulation rule proceeding until July 1, 1971.* That Act made explicit, however, that it was not intended to limit the existing authority of the FTC with respect to unfair or deceptive acts or practices in the advertising of cigarettes.** In July, 1971, instead of attempting to resuscitate its trade regulation rule proceeding, the FTC served appellants with proposed complaints, pursuant to § 45(a) of the Act, charging them with a deceptive practice, i.e., the failure to properly disclose in their advertising the hazards of using their product (A. 220). Thereafter, appellants entered into negotiations with the FTC which resulted in the Consent Orders. Each of the appellants has waived any right to judicially contest the validity of the Consent Orders.

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* See 15 U.S.C. § 1336(a).

** See 15 U.S.C. § 1336(b).

On or about September 1, 1972, appellants submitted compliance reports as required by the Consent Orders. Assuming that the information submitted in these reports was accurate and complete, the FTC reported to Congress in December, 1972, and January, 1974, that industry practice was in substantial compliance with the Orders (A. 223). Subsequently, however, numerous ongoing violations came to the attention of the FTC, involving advertising practices that appellants had employed prior to and since September, 1972, but which they had not disclosed in their compliance reports, or practices commenced by appellants after they had filed those reports (A. 224-25). As a result of these discoveries, a compliance investigation was initiated (A. 225-26). During the course of this investigation and attendant settlement negotiations, particularly during the period November, 1974 through January, 1975, a number of meetings were held with appellants at which staff members of the FTC detailed the advertising practices and the particular advertisements which they regarded as being in violation of the Consent Orders (A. 226-27).

By March, 1975, the settlement negotiations had broken down for several reasons, including that appellants had refused to accept the staff's interpretation of the Consent Orders (A. 226-27). On or about March 17, appellants submitted a detailed position statement to the FTC and called upon it to reject the staff's interpretations of the Consent Orders (A. 227-28). The FTC responded by letters dated August 1, 1975, indicating its support for the staff's interpretation and advising appellants that it was prepared to seek the immediate enforcement of the Orders by means of an action for civil penalties for violations, including a failure to display the health warning in certain promotional materials, and granting a six-month grace period to correct other violations (A. 36, A. 58, A. 79, A. 101, A. 164, A. 185).

The purpose of this pre-enforcement disclosure of the FTC's intent, was to give appellants the opportunity to come forward with a reasonable settlement offer (A. 228). Instead, appellants commenced the instant pre-enforcement, declaratory actions coupled with requests for stays of the accumulating penalties provided by 15 U.S.C. § 45(l).

Issues Presented for Review

1. Are alleged violators of previously established FTC cease and desist consent orders entitled to a stay of the operation of statutory penalties as a matter of law?

2. Did the court below abuse its discretion by denying a stay of penalties on the grounds that appellants had failed in their burden of showing that any injury they might suffer as the result of possible penalties outweighed strong, countervailing public interests?

Statutes Involved

Title 15, United States Code, Section 45(a)(1) declares unlawful all "unfair or deceptive acts or practices in or affecting commerce . . ." 15 U.S.C.A. § 45(a)(1), 1 New Laws and Court Constructions (Feb. 1975).

Title 15, United States Code, Section 45(b) provides that whenever the FTC has reason to believe that any corporation is employing any deceptive act or practice affecting commerce, it may serve such corporation with a complaint stating its charges and after a hearing and a finding that the questioned practice is prohibited by the Act, issue a cease and desist order. 15 U.S.C.A. § 45(b), 1 New Laws and Court Constructions (Feb. 1975).

Title 15, United States Code, Section 45(c) provides in relevant part that any business which is subject to a FTC cease and desist order:

> may obtain review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside . . .

Title 15, United States Code, Section 45(g)(1) provides in relevant part that an FTC cease and desist order becomes final upon the expiration of the sixty-day period for filing a petition for review in a requisite court of appeals.

Title 15, United States Code, Section 45(l) provides that:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to

grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission. 15 U.S.C.A. § 45(l) (Supp. 1975).*

ARGUMENT

POINT I

Appellants were not entitled to a stay of the penalty provisions of the act as a matter of law and were required to make the conventional showing for an interlocutory injunction in order to obtain such relief.

Appellants contend that a line of definitive Supreme Court rulings establish that under the circumstances herein they are entitled to a stay of § 45(l) penalties as a matter of law, and that therefore, they do not have to satisfy the traditional burdens for obtaining a preliminary injunction.

There is no constitutional right to risk free litigation, *Ford* v. *Coleman*, *supra*, 75 Civ. 1340 (D.D.C., Sept. 22, 1975, Leventhal Circuit J.) slip op. at 10, and the "award of an interlocutory injunction by courts of equity

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* This is a recent amendment which became effective in 1973. Prior thereto the statutory penalty had been $5,000 per violation. The liability for penalties imposed by this section is incurred as of the date the relevant order becomes final per § 45(g). *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d 414, 434 (2d Cir. 1974). The penalties are *not*, as intimated by appellants, the result of the FTC's "determination" that the cigarette companies were violating the Consent Orders. Rather, any potential penalties have been triggered by the violations themselves, prior to the FTC letters of August 1.

has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *Accord*, 7 Moore's Federal Practice ¶ 65.04[1] at 65-39 (1974). Appellants present neither cases nor arguments which require a deviation from this principle under the circumstances herein.

The cases primarily relied on by the appellants are *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651 (1915) (*Wadley*); *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920); and *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961) (*St. Regis*), which for the most part are "rate" cases, having their genesis in the Court's seminal decision in *Ex Parte Young*, 209 U.S. 123 (1908) (*Young*). *Young* and its progeny establish as a basic proposition the due process right of a person to initially contest the validity of a legislative or administrative order deeply affecting his affairs uninhibited by the prospect of ruinous penalties if the suit is lost. This constitutional requirement is satisfied by a statutory scheme which provides an opportunity for safely testing the validity of statutes or administrative orders:

> It is true that the imposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate . . . before any liability for the penalties attaches. . . .
>
> And it also is true that where such an opportunity is afforded and the rate is adjudged valid, *or the carrier fails to avail itself of the opportunity*, it then is admissible, so far as due process of law is concerned, for the State to enforce adherence to the rate by imposing substantial penalties for deviations from it.

St. Louis Iron Mountain & So. Ry Co. v. *Williams*, 251 U.S. 63, 65 (1919) (emphasis added). *Accord, St. Regis, supra*, 368 U.S. at 227; *Wadley, supra*, 235 U.S. at 666-69. *Followed, Ford Motor Company* v. *Coleman*, 75 Civ. 1340 (D.D.C., Sept. 22, 1975, Leventhal, Circuit Judge), slip op. at 8-10. In short, the above constitutional requirement is satisfied when a party wishing to judicially contest the validity of an administrative order, is afforded such opportunity before liability for noncompliance attaches. *Ford, supra* at 8. The Government concedes the soundness of this principle and merely notes that is it completely inapplicable under the circumstances herein.

The penalties to which the cigarette companies may be subjected did not attach prior to an opportunity to safely contest the validity of the Orders. Rather, it was only after they entered into consent decrees, effectively acknowledging their validity and waiving the right to such a challenge that they risked penalties for violations. Section 5 of the Act, 15 U.S.C. § 45, is thus in full compliance with the constitutional principle enunciated by *Young*. An FTC cease and desist order does not become final and enforcible until the party against whom it is directed has had the opportunity to contest its validity in a court of appeals, or, as here, has failed to avail himself of this opportunity within the prescribed time.

Consistent with their agreement, the plaintiffs are not now challenging the validity of the Consent Orders, but rather, their interpretation by the FTC. Thus, the question here is not that concluded by the *Young* line of cases, whether one is entitled to a stay of severe penalties which tend to inhibit resort to the courts to test the validity of an order. Rather, the question before this Court is the entirely different one of whether one

already subject to an unquestionably valid order is entitled to a stay of penalties as a matter of law, at what may be termed the compliance or enforcement stage of the administrative process. *See*, *United States* v. *Beatrice Foods Co.*, 322 F. Supp. 139, 141 n. 1 (D. Minn. 1971).

The argument of whether the accumulation of § 45(l) penalties should be stayed as an inhibition on due process has been advanced and squarely rejected by two courts; in each case the motion for a stay was denied. *Floersheim* v. *Weinberger*, 346 F. Supp. 950, 956 (D.D.C. 1972), *mod. on other grounds and aff'd sub. nom.*, *Floersheim* v. *Engman*, 494 F.2d 949 (D.C. Cir. 1973); *United States* v. *Beatrice Foods Co.*, *supra*, 322 F. Supp. 139. Thus, plaintiffs' claim that they are entitled to such a stay as a matter of law is rebutted by the apposite authority.

Sound policy considerations, arising from a clash of competing interests, underlie the distinction between the treatment afforded litigants seeking a stay of penalties resulting from an untested order contrasted to penalties arising from violations of an adjudicated or consent order.

The interest in providing free access to the courts is indisputable. Once however, an order has been upheld by a court or on consent the conditions of access change, yielding to the equally indisputable right of a state to impose fines and penalties for violation of its laws.

> [T]here is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed to do so.

Wadley, supra, 235 U.S. at 667. *Accord, St. Louis Iron Mountain & So. Ry. Co.* v. *Williams, supra,* 251 U.S. at 66. In "the eternal struggle that exists between the avarice, enterprize and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measure of policy adopted by the legislature." *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 683-684 n. 24 (1974), *quoting, United States* v. *160 Bags of Coffee,* 8 Cranch 398, 405 (1814). Harsh penalties and forfeitures have always been sustained in the face of constitutional attacks to the extent that their punitive and deterrent purposes are in furtherance of a substanial public interest. *See, Calero-Toledo* v. *Pearson Yacht Leasing Co., supra,* at 686-88.

It is the cumulative aspect of § 45(l) penalties which lend them a degree of severity. It was the view of Congress however, that such cumulative penalties were fair and the only way of enforcing FTC orders in the face of profitable repeated, or continuing violations. 96 Cong. Rec. 2974 (remarks of Congressman Cooley), 2981 (remarks of Congressman Poage), 3018-19 (remarks of Senator George), 3025 (remarks of Senator Aiken) (1950).* The legislative history of the Act:

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* Section 45(l), as presently written, penalizes two general types of activity. A party that simply ignores a mandatory order of the FTC becomes liable for a maximum penalty of $10,000 for each day of violation, while one who affirmatively violates the order, is exposed to a maximum penalty of $10,000 for each such violation, of which they may be more than one in any given day. *See, United States* v. *J. B. Williams Co., Inc.,* 498 F.2d 414, 435-36 (2d Cir. 1974). The alleged violations by the plaintiffs herein are of both types. The above legislative history is from the debate preceding passage of the 1950 Amendment to the Act, which first provided for cumulative penalties for continuing violations of mandatory FTC orders.

> makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example Senator Aiken, chief proponent of the 1950 Amendment said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, 'the fine would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed.'

United States v. *ITT Continental Baking Co.*, — U.S. —, 43 U.S.L.W. 4266, 4269 (Feb. 19, 1975) (*ITT Continental*), *quoting* Senator Aiken, 96 Cong. Rec. 3025 (1950). *Accord*, remarks of Congressman Poage, 96 Cong. Rec. 2981 (1950). In recently construing the cumulative penalty provisions of § 45(l), the Supreme Court found them to be fair because they were reasonably related to deterring cumulative violations of FTC orders having two characteristics: (1) detriment to the public and advantage to the violator which increased with time; and (2) a continuing ability on the part of the violator to eliminate the effects of his violation, if he were so motivated. *ITT Continental, supra* at 4269. Moreover, even the cases relied upon by the appellants state that the State may properly impose extreme and cumulative penalties to compel obedience with an order after the order has been determined valid. *Young, supra*, 209 U.S. at 146; *Wadley, supra*, 235 U.S. at 667-68.

If the imposition of cumulative penalties for violation of an established administrative order is an appropriate means by which the State may deter contempt of such an order, and the penalty provisions of § 45(l) are a fair and reasonable exercise of this power, it follows that one

charged with violating a final FTC order is not entitled to a stay of such penalties, pendente lite, as a matter of right. Rather, in order to obtain a stay under such circumstances one must satisfy the conventional requirements for obtaining injunctive relief, which of course, will involve a balancing of the public and private interests.

On the basis of the foregoing it can be seen that appellants' contention at page 16 of their brief, that the cumulative aspect § 45 penalties brings this matter within the *Young* line of cases is without merit. As noted above, all the apposite authority is to contrary, *Floersheim* v. *Weinberger, supra,* 346 F. Supp. 950, *aff'd as modified, Floersheim* v. *Engman,* 494 F.2d 949; *United States* v. *Beatrice Foods Co., supra,* 322 F. Supp. 139, and appellants' attempts to distinguish these cases are spurious.

Addtional support for the Government's position may be derived from the recent decision in *Ford* v. *Coleman, supra,* 75 Civ. 1340 (D.D.C., Sept. 22, 1975, Leventhal, Circuit J.) slip op., (*Ford*). In *Ford,* the plaintiff attacked the penalty provisions of the Motor Vehicle & Schoolbus Safety Act of 1974, as unconstitutional, contending that their excessive nature deterred manufacturers from exercising their right to litigate the validity of orders issued pursuant to that statute. Accordingly, the decision in *Ford* was governed by the precedents established by *Young* and its progeny. Judge Leventhal, writing the majority opinion for a three judge district court,* recognized this, and suggested that a statutory

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* Judge Parker concurred. It should be noted that Judge Parker authored the opinion in *Floersheim* v. *Weinberger* and that Judge Leventhal wrote the affirming opinion for the D.C. Circuit in *Floersheim* v. *Engman.*

scheme which inevitably beset initial review of the validity of an administrative order with severe cumulative penalties, might not be able to pass constitutional muster. *Ford* at 16. While *Ford* did not deal with the question presented herein, Judge Leventhal nevertheless found occasion to cite *Floersheim* with approval, as an example of a case where a stay of cumulative penalties was properly denied on public interest grounds. *Id.* at 15, n. 37 and accompanying text. Moreover, Judge Tenney's decision below was cited approvingly on two occasions. *Id.* at 17, ns. 43 and 44. By thus affirming the cases relied on by the Government and distinguishing them from the *Young* situation, *Ford* provides further support for the principle that an accused contemnor has no right to litigate his alleged violations risk free.*

In any event, § 45 penalties are not truly cumulative. As will be discussed more fully, *infra*, their upward accumulation is limited by the discretion reposed in the courts to determine the ultimate amount of penalties on an equitable basis. Moreover, it has long been the intent of both Congress and the FTC that § 45 penalties would be limited in accord with the resources of the violator, so that they would not be destructive of ligitimate busi-

* The fact that the *Ford* court granted the manufacturer a TRO is of no consequence. This TRO was granted to permit the manufacturer a short grace period in which to make a motion in the Government's enforcement action, to which it was remitted, for a preliminary injunction to stay the operation of statutory penalities. In this case plaintiffs have already moved for a preliminary injunction and need no such grace period. Additionally, the threshold showing required to obtain this TRO was of a very low order. *Ford* at 11.

ness.* This interest was made more explicit by the 1975 amendment of § 45(m) which provides that in determining the amount of civil penalties in cases of continuing violations "the court shall take into account the . . . ability to pay [and the] effect on ability to continue to do business. . . ." 15 U.S.C.A. § 45(m)(1)(C), 1 New Laws and Court Constructions (Feb. 1975). While § 45(m) applies to actions brought directly by the FTC for knowing violations, it can hardly be doubted that district judges assessing § 45(l) penalties for less culpable violations will be bound by its terms. Thus, while § 45 reasonably permits an accumulation of penalties to deter cumulative injury to the public, it protects violators from ruinous judgments by limiting such accumulation to the point where they can pay the penalty without inhibiting their ability to continue in business. The Government submits that this scheme strikes a proper balance between the relevant competing interests.

Appellants stress that *St. Regis, supra,* 368 U.S. 208, entitles them to a stay as a matter of law. Aside from the fact that the violator in *St. Regis* was challenging the validity of the order, and by its very terms, the relevant dicta in *St. Regis* at 226-27 would require a

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* Indicative of this are the following statements from the floor debates attending passage of the 1950 Amendment to § 45(l):

> [I]t is inconceivable to me that any Federal court would impose penalties under this section which are not reasonably related both to the seriousness of the offense charged and the size and resources of the defendant. 96 Cong. Rec. 2974, 3026 (1950) (letter from W. T. Kelley, General Counsel, FTC to Senator Fulbright).
>
> In no event would the court sanction any unreasonable penalty, or any such total penalty as would be destructiv of legitimate business. So, therefore, I do not think there is any real danger here to legitimate business. 96 Cong. Rec. 3019 (1950) (remarks of Senator George).

traditional showing for a preliminary injunction, appellants' reliance on *St. Regis* is further misplaced because that case involved a mandatory penalty. *United States* v. *Beatrice Foods Co.*, *supra*, 322 F. Supp. at 141 n. 1 and accompanying text.

In *St. Regis*, the alleged violator was subject to mandatory penalties, accumulating at the rate of $100 per day pursuant to 15 U.S.C. § 50,* for failure to comply with FTC orders directing the submission of various reports. As the Supreme Court noted at 227, § 50 penalties cannot be mitigated by a court once they attach. Thus, without a stay, a party subject to such penalties must litigate on an all or nothing basis, and may ultimately be subjected to a ruinous judgment for even the most technical, inadvertent, or good faith violation. *United States* v. *Paul B. Elder Co.*, Trade Cases, 1974-2, ¶ 75,238 (D. Del. 1974). In sharp contrast, the daily penalties which accumulate under 15 U.S.C. § 45(l) represent only a maximum penalty and the amount which may ultimately be assessed lays solely in the discretion

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* 15 U.S.C. § 50 in its present form does not differ in any relevant fashion from its predecessors which were applicable during the pendency of *St. Regis.* The relevant portion of said statute is as follows:

> If any persons, partnership, or corporation required by sections 41 to 46 and 47 to 58 of this title to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States.

15 U.S.C.A. § 50, 1 New Laws and Court Constructions (Feb. 1975).

of the adjudicating court. 96 Cong. Rec. 2975 (1950) (remarks of Congressman Cooley). *ITT Continental Baking Co., supra*, 43 U.S.L.W. at 4268 n.6; *United States* v. *J. B. Williams Co., Inc., supra*, 498 F.2d at 438; *United States* v. *Paul B. Elder Co., supra*. In exercising such discretion, the court may consider various factors in addition to the ability to pay and the effect on the violator's ability to continue to do business, including: the harm to the public resulting from such violations; good faith; due care; any history of prior similar conduct; the extent of the violator's cooperation with the FTC; and delay on the part of the FTC in initiating the enforcement suit. 15 U.S.C.A. § 45(m)(1)(C), 1 New Laws & Court Constructions (Feb. 1975); *United States* v. *J. B. Williams Co., Inc., supra* at 438; *United States* v. *Ancorp National Services, Inc.*, 367 F. Supp. 1221, 1224 (S.D.N.Y. 1973); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 389 (S.D.N.Y. 1966); *United States* v. *American Greetings Corp.*, 168 F. Supp. 45, 50 (D. Md. 1958). Thus, the potential for an abuse of due process, inherent in a scheme of severe, mandatory penalties, is not present here.

In conclusion, the Government submits that the *Young* line of cases relied on by appellants are virtually inapposite since § 45 satisfies the requirements of due process in the manner they prescribe. Furthermore, § 45 penalties are discretionary and reasonably calculated to deter continuing violations. Consequently, appellants are afforded no basis for their contention that they are entitled to a stay of such penalties as a matter of law. This is in accord with all the relevant authority and conforms to the broader principles of law cited initially. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *Accord*, 7 Moore's Federal Practice ¶ 65.04[1] at 65-39 (1974). *Ford, supra* at 10. In order to obtain the stay

sought below, appellants were required to meet the conventional burden for obtaining an interlocutory injunction.

POINT II

Appellants failed to meet their burden of showing that the balance of equities tipped sharply in their favor and consequently the District Court's denial of the stay was not an abuse of discretion and should be affirmed.

A preliminary injunction is an extraordinary remedy. *Saunders* v. *Airline Pilots Association International*, 473 F.2d 244, 248 (2d Cir. 1972). The settled rule in this Circuit is that in order to obtain such relief, a litigant must meet the burden of demonstrating either a combination of probable success on the merits and the possibility of irreparable injury, or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships tips "decidedly" in his favor. *Stamicarbon N.V.* v *American Cyanamid Co.*, 506 F.2d 532, 536 (2d Cir. 1974) (*Stamicarbon*); *Stark* v. *N. Y. Stock Exchange, Inc.*, 466 F.2d 743, 744 (2d Cir. 1972). Where the public interest may be impaired by the grant of a preliminary injunction, a more substantial showing is required of the movant within the context of the above test. *See, Ford, supra* at 15. " 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved' ". *Yakus* v. *United States*, 321 U.S. 414, 441 (1943), and *Stamicarbon, supra* at 537, *quoting Virginia Ry. Co.* v. *System Federation*, 300 U.S. 515, 552 (1937). *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156 (1967);

Associated Securities Corp. v. *S.E.C.*, 283 F.2d 773, 775 (10th Cir. 1960); *Floersheim* v. *Weinberger, supra*, 346 F. Supp. at 956. Motions for a preliminary injunction are addressed to the discretion of the district court whose decision should not be disturbed unless there has been an abuse of discretion. *Yakus* v. *United States, supra*, 321 U.S. at 440; *Stamicarbon, supra* at 536-37; *Stark* v. *N. Y. Stock Exchange, Inc., supra* at 744; 7 Moore's Federal Practice, ¶¶ 65.04[1] and 65.04[2] (1974).

A reading of appellants' brief indicates that they make no claim as to having proven the probability of success on the merits and rely solely on the second alternative of this Circuit's aforementioned test for determining entitlement to a preliminary injunction. (Appellants' Brief at 18-19).* In his decision below, Judge Tenney assumed, *arguendo*, that appellants had posed a serious question on the merits. He found, however, that the limitations on the imposition of § 45(l) penalties viewed in concert with the strong public interest militating against their stay, precluded a finding that appellants had met their burden of showing that the equities tipped decidedly in their favor.

With reference to the question of hardship, appellants claim that without a stay they are subjected to the choice of aquiescing, at substantial cost, to what they deem to be an erroneous interpretation of the relevant Orders by the FTC, or litigating in the face of poten-

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* The so-called "counter affidavits" included in the Appendix by appellants (A. 302-511) were first filed on September 8, 1975 (A. 3), nine days after the court below issued the decision appealed from. As such, these counter affidavits are not properly included in the Appendix since they require *ne novo* consideration by this Court.

tially ruinous, accumulating penalties. Appellants contend that being put to this choice violates due process to the extent that it inhibits whatever right they may have to judicially contest the FTC's interpretation.

As indicated above in Point I, the equitable limitations on the accumulation of § 45(l) penalties inherent in their discretionary nature, vitiates appellant's claims of undue hardship. This view finds its clearest expression in *Floersheim* v. *Weinberger, supra,* 494 F.2d 949, which decided an action virtually identical to the one brought herein.

In *Floersheim,* various forms used by the plaintiff in his business had been determined by the FTC to be unlawfully deceptive. After the FTC had issued its cease and desist order, plaintiff sought review before the Ninth Circuit Court of Appeals, which sustained the FTC's findings and caused the issuance of a final order. Thereafter, plaintiff submitted a revised version of the unlawful form to the FTC as part of a required compliance report. This report was rejected by the FTC and plaintiff was warned by letter that use of the revised form or any other form violative of the order might subject him to a suit for civil penalties. Plaintiff, who had continued to use the forms originally declared deceptive, which subjected him to liability under the accumulating penalty provisions of § 45(l), responded by seeking pre-enforcement review of the FTC's rejection of the compliance report, coupled with a motion to stay the potential accumulation of penalties. The district court, in a decision relied on by Judge Tenney, denied the stay. *Floersheim* v. *Weinberger, supra,* 346 F. Supp. at 956.

On appeal, the question of the stay was never reached because the D. C. Circuit dismissed the action on juris-

dictional grounds equally applicable to this case. *Floersheim* v. *Engman, supra,* 494 F.2d 949. Nevertheless, the D. C. Circuit's decision was directed toward the same due process argument raised by appellants herein and is most relevant to their claim of hardship. In its decision the court held that the plaintiff Floersheim's:

> sketch of an unfairly onerous choice is too darkly drawn by far . . . the statutory provision for civil recovery of penalties . . . refers to a maximum, not a minimum. There is room for leniency by the court, if [the violator's] view of the meaning of the order is plausible and not defiant.
>
> The equitable limitations inherent in the Government's remedies are a substantial protection for a respondent with a reasonable and bona fide claim. *Floersheim* v. *Engman, supra,* at 952-53.

In distinguishing various precedents, including *Young, supra,* the D. C. Circuit further held that the "circumstances and equities presented by [Floersheim] are of an entirely different and lesser order of magnitude. . . ." *Id.* at 954.

Appellants' claim of undue hardship is additionally vitiated, if not entirely dispelled, by the 1975 amendment to § 45(m) which makes it clear that violators may not be assessed penalties under § 45 that are beyond their means, or that would prevent them from continuing in business. Thus, the fear of a ruinous penalty, which is at the heart of appellants' claim of undue hardship is baseless, since destructive penalties of this magnitude are barred by the statute. It is true that § 45 provides for severe penalties, as it must to fulfill its deterrent purposes, but these are appropriately limited so that appellants are in a position not much

different from that of any prospective litigant confronted with substantial claims, who must evaluate the merits of his case and make a decision to settle or litigate. Indeed, if the facts and equities are as appellants suggest, they can anticipate nominal, or moderate damages at worst. Conversely, deterrence of an insubstantial contest, in favor of prompt compliance, is an appropriate function of § 45 if appellants' case lacks merit.

Opposed to the hardship alleged by appellants are several real points of public interest. There is a strong public interest in maintaining the integrity and credibility of the deterrent system embodied in § 45. As noted above in Point I, Congress bolstered the continuing penalty provisions of § 45 in 1950, so that they would not be viewed by potential violators as an acceptable cost of violation. In construing these same provisions, the Supreme Court too expressed its concern that they not "be converted into a minor tax upon violation which could reap large financial benefits to a perpetrator" least the deterrent system of § 45 be "entirely undermined". *ITT Continental, supra,* 43 U.S.L.W. at 4269. There is little doubt, however, that the prospect of a stay of penalties during a protracted period of litigation will have this very effect by encouraging otherwise quiescent businessmen to believe that they can profitably violate the Act. Furthermore, the prospect of an extended stay will encourage frivolous suits for the purpose of delaying enforcement. *Floersheim* v. *Weinberger, supra,* 346 F. Supp. at 956. *See, Floersheim* v. *Engman, supra,* 949 F.2d 953-54. For example, if appellants' interpretation of the Consent Orders is meritless and self-serving, granting the stay would infringe the public interest in receiving adequate warnings on the hazards of cigarette smoking, by afford-

ing appellants the opportunity for risk-free delay of full implementation of the Consent Orders.*

When the strong public interest in maintaining the deterrent system embodied in § 45, and in preventing spurious delays in the enforcement of FTC orders, is balanced against appellants' rather illusory allegations of potentially ruinous damages, it is clear that appellants have failed to meet their burden of a substantial showing that the balance of the equities herein tips "sharply" in their favor. Thus, Judge Tenney's decision below denying appellants' motion for a stay, rather than constituting an abuse of discretion, was correct.

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* The intimation at page 19 of appellants' brief that the public interest is not involved because Congress specifically required warnings on cigarette packages, but not on advertising, is disingenuous. The fact that the cigarette companies entered into consent orders regarding print advertising, rather than risk litigation of this issue hardly renders the public interest any less important. Furthermore, Congress' failure to require a warning statement in print advertising in the 1969 Cigarette Act, appears to have been motivated by a desire for this matter to be handled within the confines of the FTC's existing complaint procedures under § 45, rather than any view that the public interest did not require some restraint on cigarette print advertising.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

October, 1975

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-6081

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 15th day of October 19 75 she served ~~a copy~~ 2 copies of the within Government's brief on appeal

by placing the same in a properly postpaid franked envelope

addressed:

1) Messrs. Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Ave. NY NY 10022 &
2) Messrs. Arnold & Porter, Conboy, Hewitt O'Brien & Boardman, 20 Exchange Place,
3) Messrs. Davis, Polk & Wardwell, Esqs., One Chase Manhattan Plaza, NY NY 10005
4) Messrs. Weil, Gothshal & Manges, 767 Fifth Ave. NY NY 10022
5) Messrs. Chadbourne, Parke Whiteside & Wolff, 30 Rockfeller Plaza, NY NY 10020
6) GraingerR. Barrett, Esqs., 75 Rockefeller Plaza, NY NY 10020

And deponent further says she sealed the said envelopes and placed the same in the mail box ~~mail chute drop~~ for mailing/~~in~~ the United States Courthouse, /outside Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

15th day of October 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977